

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

NUTRAMAX LABORATORIES, INC. and  
NUTRAMAX LABORATORIES  
VETERINARY SCIENCES, INC.

Plaintiffs,

v.

ERWI LLC; MURTAZA HAYAT;  
FLASHSHIP LOGISTICS, LLC; JONNY HO;  
DỠ VĂN TÂN; DUTA GLOBAL COMPANY  
LIMITED; the Individuals, Partnerships,  
Business Entities, or Unincorporated  
Associations operating the Amazon Seller  
Accounts  
“hongtongxiantanlinmaoyiyouxiangongsi” and  
“ZHONGwanfulin” and the eBay Seller  
Accounts “tharakneth-0,” “kinsaypua\_01,”  
“pham\_4600,” “dulanga\_mart,” “chelsehun-3,”  
“lotrant-28,” “yaddowm,” “kaykay1009,”  
“damia-901,” “phamli\_40,” “aliin-91,”  
“gabpulga0,” “kgac.huy\_5,” “wenuk04,”  
“chelakaka37,” “mr.louie86,” “heda-6844,”  
“maleneth15,” “saphun-0,” “isukasan0,” “dada-  
90,” and “gina-7042”; and JOHN DOES 1  
through 30, each of which is an Individual,  
Partnership, Business Entity, or Unincorporated  
Association,

Defendants.

Civil Action No. 1:23-cv-897

**JURY TRIAL DEMANDED**

**NUTRAMAX’S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT**

Pursuant to Fed. Civ. P. 15(a)(2) Plaintiffs Nutramax Laboratories, Inc. and Nutramax Laboratories Veterinary Sciences, Inc. (collectively, “Nutramax”) file this Motion for Leave to File a Third Amended Complaint to add DỠ Văn Tân (“Mr. Tan”) and Duta Global Company Limited (“Duta”) as Defendants. Nutramax believes that Mr. Tan and Duta are the ultimate source of the

counterfeit products at issue in this case distributed by Defendants Flashship Logistics LLC (“Flashship”) and Jonny Ho (“Mr. Ho”). Nutramax is also adding information regarding additional Nutramax trademarks that have been counterfeited as part of the Defendants’ activity, and additional facts and counts that serve as alternative theories of liability as to Flashship and Mr. Ho. Nutramax’s proposed Third Amended Complaint is attached hereto. Nutramax does not anticipate requesting any further amendments.

### **BACKGROUND**

On August 1, 2023, Nutramax filed a Complaint against ERWI LLC, Murtaza Hayat, and John Does 1 through 10, each of which is an individual, partnership, business entity or unincorporated association; alleging, among other things, that the defendants were involved in the advertising, selling, distributing, and/or offering for sale of counterfeit PROVIABLE products. (ECF No. 1). As alleged in Nutramax’s original Complaint, the Defendants were offering for sale and/or selling unauthorized and unlicensed counterfeit pet supplements using Nutramax’s federally registered trademarks and copyrights. (*See id.*). Also on August 1, 2023, Nutramax filed a Motion for an *Ex Parte* Temporary Restraining Order and Preliminary Injunction against ERWI LLC, Murtaza Hayat, and John Does 1-10. (ECF No 3.) On August 2, 2023, the Court granted Nutramax’s requested temporary restraining order (“TRO”). (ECF No. 12). On September 13, 2023, following a hearing, the Court issued an order granting Nutramax’s Motion for Preliminary Injunction against ERWI LLC, Murtaza Hayat, and John Does 1 through 10. (ECF No. 22).

On December 13, 2023, Nutramax filed a Motion for Leave to File an Amended Complaint to add new Defendants and a proposed Amended Complaint. (ECF Nos. 26, 30). The Amended Complaint was entered on January 9, 2024. (Text order, January 9, 2024). All of the products (specifically, Nutramax’s COSEQUIN and DASUQUIN products) sold by the newly added

Defendants discussed in the First Amended Complaint, regardless of seller or platform, were distributed by Defendant Flashship Logistics, LLC, a Texas limited liability company headquartered in Richardson, Texas (“Flashship”). Nutramax also filed a Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 31) against the Defendants added in the First Amended Complaint; the Court granted the TRO on January 12, 2024 (ECF No. 32).

After moving for leave to file its First Amended Complaint, Nutramax became aware of additional online sellers of counterfeit Nutramax products on eBay—specifically, the eBay seller accounts “gabpulga0,” “kgac.huy\_5,” “wenuk04,” “chelakaka37,” “mr.louie86,” “heda-6844,” “maleneth15” “saphun-0,” “isukasan0,” “dada-90,” and “gina-7042.” The counterfeit products purchased from these online sellers were shipped by Flashship, Mr. Ho, and (purportedly) Chewy according to the return addresses on the packages received through test purchases. Nutramax also discovered that some Defendants listed in the First Amended Complaint were selling counterfeits of an additional Nutramax product, DENAMARIN. Nutramax therefore filed a Second Motion for Leave to Amend its Complaint on May 10, 2024 (ECF No. 58); the Court granted the Motion on May 16, 2024, and Nutramax’s Second Amended Complaint was entered on the docket on May 17, 2024 (ECF No. 61). Nutramax also filed a Motion for Temporary Restraining Order and Preliminary Injunction against the Defendants added in the Second Amended Complaint (ECF No. 59); on May 17, 2024, the Court granted the requested temporary restraining order (ECF No. 63).

The Court held a hearing on May 29, 2024 (ECF No. 69) on Nutramax’s requested preliminary injunctions against the Defendants added in the First and Second Amended Complaints. The Court requested that Nutramax submit a proposed Preliminary Injunction Order after the hearing, which Nutramax filed on June 6, 2024 (ECF No. 73). The requested preliminary injunction and proposed order are pending.

As Nutramax’s investigation of this matter has continued, Nutramax has learned (through documents produced by Flashship, a 30(b)(6) deposition of Flashship, and a phone call with Mr. Ho) that an individual named Đỗ Văn Tân and his company, Duta Global Company Limited, were the source of the counterfeit products shipped by Flashship and Mr. Ho at issue in this matter. The details of Mr. Tan and Duta’s business relationship with Flashship and Mr. Ho, and the services provided by Flashship and Mr. Ho for Mr. Tan and Duta, are detailed in the attached proposed Third Amended Complaint.

### **LEGAL STANDARD**

Federal Rule of Civil Procedure Rule 15(a)(2) allows a party to amend its pleading with the opposing party’s written consent or the court’s leave. “The court should freely give leave when justice so requires.” Fed. R. Civ. P. 15(a)(2). The Supreme Court has endorsed this liberal policy for allowing amendments—stating that Rule 15(a)’s “mandate is to be heeded.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). “‘Rule 15(a) requires a trial court to grant leave to amend freely, and the language of this rule evinces a bias in favor of granting leave to amend.’” *See Marucci Sports, L.L.C v. NCAA*, 751 F.3d 368, 378 (5th Cir. 2014) (quoting *Jones v. Robinson Prop. Grp., LP*, 427 F.3d 987, 994 (5th Cir. 2005)). “Leave to amend is in no way automatic, but the district court must possess a ‘substantial reason’ to deny a party’s request for leave to amend.” *Id.* (quoting *Jones*, 427 F.3d at 994). Courts in this district examine “five considerations to determine whether to grant a party leave to amend a complaint: 1) undue delay, 2) bad faith or dilatory motive, 3) repeated failure to cure deficiencies by previous amendments, 4) undue prejudice to the opposing party, and 5) futility of the amendment.” *Smith v. EMC Corp.*, 393 F.3d 590, 595 (5th Cir. 2004).

### **ARGUMENT**

All of the considerations identified above weigh in favor of granting this Motion.

**First**, the proposed amendment has not been unduly delayed. The Fifth Circuit has explained, ““amendments should be tendered no later than the time of pretrial[.]”” *Id.* (quoting *Glass v. Petro-Tex Chem. Corp.*, 757 F.2d 1554, 1562 (5th Cir. 1985)). This case is still within the pretrial period and a scheduling order was only just entered (ECF No. 77); this Motion is being filed within the deadline of June 28, 2024 set for amended pleadings in that scheduling order. Further, Nutramax has moved quickly to file this Motion.

**Second**, this Motion is not driven by any impermissible motive. The Motion is not filed to harass or otherwise harm any current Defendants or Mr. Tan and Duta. It instead has been filed to help stop the broad range of rampant online counterfeiting of Nutramax’s products. Adding Mr. Tan and Duta as Defendants as part of a Third Amended Complaint provides no procedural or strategic advantage to Plaintiff—instead, it enhances efficiency by streamlining these issues for the Court in a single matter. Nutramax is also including additional information it has learned about Flashship and Mr. Ho’s relationship with Mr. Tan and Duta, as well as information on additional trademarks owned by Nutramax that have been counterfeited as part of the Defendants’ activity.

**Third**, this Motion is not the result of a repeated attempt to cure a deficient complaint. Nutramax’s prior Complaints were not deficient, and no answers have been filed by any Defendant apart from Flashship, which has consented to this Motion. Further, this Court previously granted Nutramax’s Motions for Leave to File Amended Complaints to add additional Defendants participating in the same counterfeiting activity as the existing Defendants.

**Fourth**, no Defendants, including Mr. Tan and Duta, will be unduly prejudiced in any way by the proposed amendment. “A defendant is prejudiced if an added claim would require the defendant ‘to reopen discovery and prepare a defense for a claim different from the one that was before the court.’” *Id.* at 596 (quoting *Duggins v. Steak ‘n Shake, Inc.*, 195 F.3d 828, 834 (5<sup>th</sup> Cir.

1999)). Here, although Nutramax is proposing to add additional counts against Flashship and Mr. Ho, those counts serve as alternative theories of liability for the same activity of Flashship and Mr. Ho that was the subject of Nutramax's prior complaints. Discovery does not close until February 28, 2025, providing all Defendants ample opportunity to defend themselves against the claims in the Third Amended Complaint.

*Finally*, the request is not futile as Nutramax has set forth viable claims of counterfeiting against Mr. Tan and Duta in the proposed Third Amended Complaint, as well as viable additional counts that serve as alternative theories of liability against Flashship and Mr. Ho.

Pursuant to Local Rule CV-7(g), Nutramax attempted to meet and confer on this motion with opposing counsel for Flashship. However, Flashship's counsel has been out of the office and has not yet indicated whether they consent or object to this motion.

### **CONCLUSION**

Nutramax requests that the Court enter an Order granting its Motion for Leave to File Third Amended Complaint to add Mr. Tan and Duta to the above-captioned lawsuit and entering the attached Third Amended Complaint on the docket.

Respectfully submitted, this 28th day of June, 2024.

*/s/ Mary Grace Gallagher*

---

Jason D. Rosenberg (admitted PHV)  
*jason.rosenberg@alston.com*  
Georgia Bar No. 510855  
Uly S. Gunn (admitted PHV)  
*sam.gunn@alston.com*  
Georgia Bar No. 261871  
Mary Grace Gallagher (admitted PHV)  
*marygrace.gallagher@alston.com*  
Georgia Bar No. 121954  
ALSTON & BIRD LLP  
One Atlantic Center  
1201 West Peachtree Street  
Atlanta, GA 30309-3424  
Telephone: 404-881-7000

Brady Cox  
*brady.cox@alston.com*  
Texas Bar No. 24074084  
ALSTON & BIRD LLP  
2200 Ross Avenue  
Suite 2300  
Dallas, Texas 75201  
Tel: (214) 922-3400  
Fax: (214) 922-3899

*Attorneys for Plaintiffs Nutramax  
Laboratories, Inc. and Nutramax  
Laboratories Veterinary Sciences, Inc.*

## CERTIFICATE OF SERVICE

I hereby certify that I have this date filed the foregoing PLAINTIFF NUTRAMAX’S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT via the Court’s CM/ECF system, which will automatically give notice to all counsel of record. I have also served the foregoing on Murtaza Hayat and the operators of the Amazon Seller Accounts “hongtongxiantanlinmaoyiyouxiangongsi” and “ZHONGwanfulin” and the eBay Seller Accounts “tharakneth-0,” “kinsaypua\_01,” “pham\_4600,” “dulanga\_mart”, “chelsehun-3,” “lotrant-28,” “yaddowm,” “kakay1009,” “damia-901,” “phamli\_40,” and “aliin-91” via email as authorized by the Court. I have also served the foregoing via First Class Mail on additional Defendants at the addresses listed below.

Erwi LLC  
5900 Balcones Drive, Suite 4712  
Austin, TX 78731-4257

Jonny Ho  
420 Edgewood Drive  
Lebanon, PA 17042

This 28th day of June, 2024.

/s/ Mary Grace Gallagher  
Mary Grace Gallagher